Supreme Court, U.S.
FILED
JUN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-2009

No.

IN THE
Supreme Court of the United States
October Term, 1989

CLIFT C. LANE and DOROTHY P. LANE,

Petitioners,

v.

JOHN E. PETERSON, JR. and EDWARD H. COVELL, individually and as members of the SPECIAL PANEL, and WILLIAM B. SULLIVAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

To assure the integrity of the judicial process and the impartial administration of justice, this Court has steadfastly held that a court officer is absolutely prohibited from personally profiting, directly or indirectly, from his position of public trust.

Are Petitioners barred, as a matter of law, by the doctrine of *res judicata* from bringing an action to surcharge Respondents for their personal gain if Respondents' breach of their public trust was neither raised nor decided in a prior action between these parties?

LIST OF PARTIES

Respondents Peterson and Covell are included in this Petition, as they were in the courts below, both as individuals and in their capacity as members of a Special Panel created under a Consolidated Plan of Reorganization confirmed by the United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division. Respondent Sullivan is included as he was in the courts below as an individual.

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JOHN E. PETERSON, JR. and EDWARD H. COVELL, individually and as members of the SPECIAL PANEL, and WILLIAM B. SULLIVAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Clift C. Lane and Dorothy P. Lane, respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 30, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported; the opinion is reprinted in Appendix A at page 1a.

The Memorandum Opinion of the District Court for the Western District of Arkansas, Fort Smith Division, No. 88-2145 (Arnold, J.) was not reported; the Memorandum Opinion is reprinted in Appendix B at page 17a.

JURISDICTION

Petitioners commenced this action in the United States District Court for the Western District of Arkansas, Fort Smith Division on July 22, 1988. Jurisdiction was predicated upon 28 U.S.C. §1331. The District Court entered judgment on June 20, 1989.

The Court of Appeals for the Eighth Circuit entered judgment affirming the District Court on March 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners (the "Lanes") developed their chicken business over more than thirty-five years from a small, one-truck operation to the nation's sixth largest poultry producer. They owned the entire business either directly or indirectly through their ownership of the stock of nineteen operating companies (the "Lane Companies").

In 1982, the Lanes, personally, and each of the Lane Companies, petitioned for reorganization under the Bankruptcy Code. Shortly thereafter, the Bankruptcy Court appointed Respondent Peterson its Examiner; Peterson served as Examiner at least through March, 1987. The Bankruptcy Court confirmed a consolidated plan of reorganization in 1984. Section 7.05 of the Plan created a Special Panel "to aid in the operation of the business of Lane in the post-confirmation era both for the benefit of Lane and Creditors" (Plan Disclosure Statement, p. 20). The Lanes, with the approval of the Bankruptcy Court and the Creditors selected Peterson, the Bankruptcy Court Examiner, and Respondent Covell to serve on the Special Panel.

Under the Plan, the Special Panel was obligated to temporarily assume management of the Lane Companies if an Event of Default was not timely cured. The Creditors noticed several Events of Default in May and June of 1985. Unless cured, the Special Panel would have assumed management of the Lane Companies about August 1, 1985. By mid-June, it appeared unlikely that the defaults would be cured.

The Lanes advised their Creditors and Respondents on June 19, 1985 of their decision to sell the Lane Companies, (Appellants' Appendix, p. 324). On June 24, 1985, the members of the Special Panel received an offer from Tyson Foods, Inc., a major poultry processor, to acquire the Lane Companies, but only after the Lanes were out and the Special Panel controlled them. The Special Panel did not disclose their discussions with Tyson to the Lanes (Appellants' Appendix, p. 324). The Lanes first learned of Tyson's offer months after the Lane Companies were sold to Tyson in April, 1986 for approximately thirty-five million dollars.

Following Respondent Sullivan's recommendation (Letter, Sullivan to Lanes, July 2, 1985), the Lanes agreed to permit the Special Panel to assume management of the Lane Companies about ten days before the Special Panel was obligated to do so under the Plan. The Special Panel demanded, as a condition of assuming control early, that the Lanes transfer their stock in the Lane Companies to a trust (the "Trust") having the members of the Special Panel as trustees (Appellants' Appendix, p. 174). The Lanes believed that they were the beneficiaries of the Trust. The Lanes requested a copy of the declaration of trust on July 22, 1985, but the Special Panel, with Sullivan's knowledge and acquiescence, refused to pro-

duce one (Appellants' Appendix, p. 331). Neither the Special Panel nor Sullivan disclosed to the Lanes that, in addition to being trustees, the members of the Special Panel were also the settlors of the Trust and, through the exercise of their unfettered discretion, the sole beneficiaries of the Trust (Appellants' Appendix, p. 46).

In good faith reliance upon Sullivan, who they believed to be their counsel in the transaction and the disinterestedness of Peterson and Covell, the Lanes transferred their stock in the Lane Companies to the members of the Special Panel on July 22, 1985. The Lanes have never executed any document conveying their beneficial interest in the stock of the Lane Companies. In fact, the Lanes were not represented by counsel in this transaction. Sullivan has asserted that, although he (or members of his firm) prepared all the documents (including the Trust) and was paid for these services by the Lane Companies, he did not represent the Lanes in this tranaction (Appellants' Appendix, p. 74). The Special Panel's acquisition of the stock was never approved by the Bankruptcy Court.

The Lanes sought to recover their stock, or the value thereof, in a diversity action filed in May, 1986, *Lane v. Peterson,* No. 86-4069 (W.D. Ark.). The action was predicated upon state law theories sounding in trust, constructive trust and contract reformation (Appellants' Appendix, pp. 292-314). After trial, the court entered judgment for defendants, holding that the Lanes "have failed to sustain their burden of proof on each count of their complaint" (Appellants' Appendix, p. 341). The Court of Appeals affirmed the District Court (851 F. 2d 193 [8th Cir. 1988]). The Lanes did not petition for certiorari. In December, 1988, the Lanes moved for relief from the judgment pursuant to Rule 60(b), FRCP. The District

Court denied the motion. The Court of Appeals affirmed. Lanes' petition for certiorari was denied (*Lane v. Peterson,* No. 89-594).

The District Court did not decide whether Peterson or Covell were fiduciaries; accordingly, the District Court made no findings of fact upon which Defendants had the burden of proof (Appellants' Appendix, p. 335; 851 F. 2d 193, 196). In July, 1988, Lane commenced the instant action (No. 88-2145, W. D. Ark.) alleging, *inter alia,* breach of fiduciary duty, securities fraud and bankruptcy fraud, each a federal law claim upon which Respondents have the burden of proof. The Lanes requested a trial by jury (Appellants' Appendix, pp. 4-22). In March, 1989, the Lanes moved for summary judgment based upon Respondents' profiting from their respective positions of trust in the Bankruptcy Court (Appellants' Appendix, p. 178). Respondents admitted the Lanes' statement of facts and did not allege either *res judicata* or collateral estoppel in their response (Appellants' Appendix, pp. 208-213). The District Court denied the Lanes' motion holding, *sua sponte,* that, as a matter of law, the issue was precluded by collateral estoppel (Appendix B, p. 26a). The Court of Appeals affirmed the District Court, but held, as a matter of law, that the Lanes' claim was barred by *res judicata,* not collateral estoppel (Appendix A, p. 13a). The remainder of the Lanes' claims were also dismissed, as a matter of law, as being barred by *res judicata.*

REASONS FOR GRANTING WRIT

Allowing a fiduciary to profit from his position of trust, *for any reason,* rewards and encourages faithlessness, destroys public confidence in the integrity and impartiality of the judicial system, and conflicts with the policies adhered to by this Court since 1846.

This Court long ago established the principle that a fiduciary could not personally profit from his position of trust. *Michoud v. Girod,* 4 How. 503, 535 (1846). The prohibition derives from the relation of trust and is absolute. To surcharge a fiduciary for any personal gain, it is not necessary to prove wrongdoing by the fiduciary, loss or damage to the estate or unfairness to beneficiaries. In the bankruptcy context, this Court stated:

> A reorganization trustee is the representative of the court and it is not contended and would not be arguable that if he [the trustee] had engaged for his own advantage in the same transactions that he authorized on the part of his subordinates, he should not be surcharged. Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt, but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate enquiries as we have here into the conduct of its own appointees by expecting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question. *Mosser v. Darrow,* 341 U.S. 267, 271 (1951); *accord, Crites, Inc. v. Prudential Ins. Co. of America,* 322 U.S. 408 (1944); *Magruder v. Drury,* 235 U.S. 106, 120 (1914).

This Court even invalidated an otherwise regular sheriff's sale holding that a fiduciary can take nothing from such a

sale. *Jackson v. Ludeling,* 21 Wall. 616, 632 (1874). The prohibition applies to any person knowingly joining a fiduciary. *Jackson v. Smith,* 254 U.S. 586 (1920) (court-appointed receiver); *accord, Mosser v. Darrow, supra; Crites v. Prudential, supra; see also* 18 U.S.C. §154 (adverse interest of court officer).

The facts in this case are undisputed. Through the Trust, Peterson and Covell acquired a beneficial interest in the stock of the Lane Companies while Peterson was bankruptcy court examiner and while he and Covell were members of the Special Panel. Sullivan knew Peterson's and Covell's position in the reorganization proceedings. Moreover, Sullivan knew that the Lanes were not represented by counsel in connection with the transfer. Peterson and Covell profited from the sale of the stock. Applying this Court's teaching, Peterson and Covell must disgorge all profits from the sale.

Also undisputed is the fact that this issue was neither raised nor decided in the first lawsuit. Neither court below addressed the merits of the claim. Both courts held, as a matter of law but for different reasons, that the Lanes were precluded by the prior case from litigating the issue. By its failure to treat the Lanes' claims individually, the Court of Appeals has created an exception to this Court's holdings without considering this Court's decisions. Judge Cardozo strongly admonished against allowing exceptions in *Meinhard v. Salmon:*

> *Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by 'disintegrating erosion' of particular exceptions [citations omitted]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. 249 N.Y. 458, 469, 164 N.E. 545 (1928).*

The Court of Appeal's failure to consider the consequences of its decision, rewards respondents for their breach of trust and could only serve to undermine confidence in the impartiality of the judiciary and offer encouragement to other fiduciaries to violate their trust.

A federal court is never precluded from examining the conduct of one of its own appointees. Court appointed fiduciaries should have no expectation that their conduct will become immune to court scrutiny. Respondents' obvious insensitivity to their fiduciary responsibilities should shock the conscience of a court of equity any time it is brought to the court's attention. The Lanes' counsel in the first action inadvertently failed to include this claim. Counsel's failure cannot shield Respondents from responsibility for their breach of trust. There is no policy consideration arguing in favor of allowing Respondents to gain from their position.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted. The Court of Appeals decision should be summarily reversed and the case be remanded to the District Court to grant Petitioners' motion to surcharge Respondents for profits from sale of stock in Lane Companies.

Respectfully submitted,

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APPENDIX A—OPINION OF COURT OF APPEALS

United States Court of Appeals
For The Eighth Circuit

No. 89-2216

Clift C. Lane, Individually, and as Trustee under the Clift C. Lane Revocable Trust, and as Trustee under the Dorothy P. Lane Trust, and Dorothy P. Lane, Individually, and as Trustee under the Dorothy P. Lane Revocable Trust, and as Trustee Under the Clift C. Lane Trust,

Appellants,

v.

John E. Peterson, Jr., and Edward H. Covell, Individually and as Members of the Special Panel, and William B. Sullivan,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas

Submitted: January 18, 1990
Filed: March 30, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Clift and Dorothy Lane appeal from the district court's[1] dismissal of their claims against their attorney and

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1. The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas.

two members of a panel set up by a bankruptcy court to assist them in a title 11 reorganization. The Lanes claim that the defendants unlawfully induced them to transfer their stock in their companies to the panel and then unlawfully sold the stock to a third party. The Lanes allege that by their conduct the defendants committed securities fraud and bankruptcy fraud, violated RICO, and breached fiduciary duties under federal law. The Lanes have previously sued the two panel members regarding the same events and were denied any relief. We find that the Lanes' claims against the two panel members are barred by res judicata and that the remaining claims against their attorney are without merit for reasons to be discussed. Accordingly, we affirm.

I. BACKGROUND

Because we are reviewing the district court's grant of summary judgment and motions to dismiss for failure to state a claim, we will view the facts in the light most favorable to the Lanes, the non-moving party.

Over the course of 35 years Clift and Dorothy Lane founded and developed a large poultry business consisting of Lane Processing, Inc., Dexter Farms, Dexter Processing, Inc., and Lane Poultry of Carolina, Inc. (hereinafter "the Lane Companies" or "the Companies"). The Lane Companies eventually encountered severe financial difficulties, and in November 1982 the Lanes and the Companies filed petitions for reorganization under Chapter 11 of the United States Bankruptcy Code. In July 1984 the bankruptcy court approved a reorganization plan, which, among other things, established their business. The panel, chosen by the Lanes, consisted of John Peterson and Edward Covell, both appellees in this case, and Walter Minger, who is not a party herein. William Sullivan, the

third appellee in this case, is the attorney the Lanes hired to represent them in the bankruptcy proceedings.

The Lanes continued to manage their companies after the plan was approved, but their financial condition worsened. In May 1985 a creditor sent a notice of default to the Lanes. Pursuant to the terms of the reorganization plan, if the default was not cured by August 1 the panel would have been obligated to assume the duties of the Board of Directors of the Lane Companies at that time. It was clear that the default would not be cured in time. Mr. Sullivan, the Lanes' attorney, advised the Lanes to allow the panel to assume management before the expiration of the cure period, and the Lanes accepted that advice. However, the panel members refused to assume management early unless the Lanes would relinquish all control of the Lane Companies and convey all of their stock therein to the panelists in trust for the Lane Companies. The Lanes agreed to do this.

On July 22, 1985, the Lanes, along with their attorney, met with the members of the panel to conduct these transactions. At that time the Lanes formally resigned from the Companies' Board of Directors, elected the three panelists to those positions, and conveyed their stock in the Companies in a stock transfer agreement to the panelists as trustees under a Declaration of Trust. The Declaration of Trust, which was executed only by the panelists, stipulated that the stock would be held in trust by the panelists as trustees for the benefit of the Lane Companies' employees, but gave the panelists discretion to distribute the trust's assets. The Lanes now claim that because of this discretion the panelists were actually both the trustees and the beneficiaries of the trust and thus the actual owners of the Lane Companies.

In May 1986 the panel sold the Lane Companies stock to Tyson Foods, Inc. (hereinafter "Tyson") for $35 million. According to the Lanes, the panelists had reached a secret agreement with Tyson in mid-1985 to buy the Companies from the Lanes and then sell them to Tyson. The panelists reached this agreement with Tyson without any competitive bidding and actually rejected better offers. The panelists never informed the bankruptcy court of the stock transfer from the Lanes to the panel or the sale of the Companies to Tyson.

In 1986 the Lanes sued the three panelists in federal district court, alleging that they breached their fiduciary duties under Arkansas law and requesting the court to impose a constructive trust in the Lanes' behalf on the proceeds of the sale of the stock to Tyson. The district court denied all relief. On appeal, a panel of the Eighth Circuit affirmed. *Lane v. Peterson,* 851 F.2d 193 (8th Cir. 1988) (hereinafter *"Lane I"*).

The Lanes then filed this suit against Peterson, Covell, and Sullivan, asserting claims under: (1) §10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b) (1988), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10 b-5 (1988), which prohibits any person from making misleading statements or omissions as to any material fact in connection with the purchase or sale of securities; (2) §17(a) of the Securities Act of 1933, 15 U.S.C. *§77q(a) (1988), which prohibits misleading statements or omissions in connection with the offer or sale of securities; (3) the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.* §§1961-1968 (1988), which prohibits certain racketeering activities; (4) 18 U.S.C. §152 (1988), which imposes criminal penalties against any person who knowingly or fraudulently attempts to obtain any money or property for acting or

forbearing to act in any case under title 11; (5) 18 U.S.C. §154 (1988), which imposes criminal penalties on an officer of the court in a bankruptcy proceeding who knowingly purchases any property of the estate of which he is an officer in a case under title 11; and (6) 11 U.S.C. §1127(b) (1988), which provides for modification of reorganization plans under title 11.

In its first memorandum opinion the district court granted the defendants' motion to dismiss the §17(a) securities fraud claim and the RICO claim for failure to state a claim upon which relief could be granted. The district court held that no §17(a) claim was stated because there is no implied private right of action under §17(a) and also because only defrauded purchasers, rather than defrauded sellers, may sue under the statute. The district court dismissed the RICO claim because the Lanes failed to allege that the defendants engaged in multiple fraudulent schemes as required in this circuit at that time under RICO. *Lane v. Peterson,* No. 88-2145, slip op. at 13-16 (W.D. Ark. Dec. 23, 1988).[2]

Also in its first opinion, the district court dismissed the §10(b) securities fraud claim as to Peterson and Covell, holding that the issues addressed in those claims were decided in *Lane I* and were thus barred by collateral estoppel. *Id.* at 20. The Lanes later voluntarily dismissed their §10(b) claim against Sullivan. *See Lane v. Peterson,* No. 88-2145, slip op. at 5 n.3 (W.D. Ark. April 15, 1989).

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2. The district court later noted that after its first opinion dismissing the Lanes' RICO claim the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.,* 109 S. Ct. 2893 (1989) rejected the Eighth Circuit's holding that proof of multiple schemes is required to fulfill RICO's "pattern" requirement. The district court, however, did not disturb its dismissal of the Lanes' RICO claim because it found that the Lanes nonetheless failed to allege any illegal acts that would constitute racketeering activity under RICO. *Lane v. Peterson,* No. 88-2145, slip op. at 11-12 (W.D. Ark. Aug. 2, 1989).

In its second memorandum opinion, the district court granted the defendants' motion for summary judgment on the Lanes' claims under 18 U.S.C. §§152 and 154. The Lanes' §152 claim was based on the allegation that the panelists agreed to succeed to the management of the Companies before the end of the cure period only if the Lanes gave up all of their stock in the Companies. Thus, the complaint alleges, the panelists attempted to obtain property for acting or forbearing to act in a case under title 11 in violation of §152. The court held that the stock transfer agreement did not occur in a "case under title 11" as required by the statute. *Id.* at 10. The district court treated the §154 claim as "essentially a claim for common-law breach of fiduciary duty" and held that that issue was litigated in *Lane I* and was thus barred by collateral estoppel. The district court also held that since the Lanes' fiduciary duty claim against Sullivan was derivative of their claims against Peterson and Covell, the fiduciary duty claim against Sullivan should be dismissed along with the claims against his co-defendants. *Id.* at 11-13.

In its final opinion, the district court dismissed the Lanes' claim under 11 U.S.C. §1127(b), which alleged that the stock transfer agreement amounted to a modification of the reorganization plan that required bankruptcy court approval. The district court ruled that the stock transfer agreement did not constitute a modification. *Lane v. Peterson,* No. 88-2145, slip op. at 8 (W.D. Ark. June 20, 1989).

We affirm the district court's dismissal of all claims against the defendants, although, in some respects, upon grounds different from those relied upon by the district court.

II. DISCUSSION

A. Preclusive Effect of *Lane I*

We must first determine the extent to which the claims raised in this case are barred by this court's prior decision in *Lane I.* We examine two preclusion principles: res judicata (claim preclusion) and collateral estoppel (issue preclusion).[3] "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 n.5 (1979). Thus, res judicata precludes the relitigation of a claim on grounds that were raised or could have been raised in the prior action. *Poe v. John Deere Co.,* 695 F.2d 1103, 1105 (8th Cir. 1982). "Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery,* 439 U.S. at 326 n. 5 (citations omitted).

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3. A point about terminology is worth making. In its generic sense "res judicata" is a broad term that encompasses both issue preclusion and claim preclusion. *See Migra v. Warren City School District Bd. of Educ.,* 465 U.S. 75, 77 n.1 (1984); *Hickman v. Electronic Keyboarding, Inc.,* 741 F.2d 230, 232 n.2 (8th Cir. 1984); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4402 (1981). However, the term "res judicata" is now often used in a narrower sense, as referring only to claim preclusion and not to collateral estoppel. *See Migra,* 465 U.S. at 77 n.1. Thus, courts now often speak of res judicata and collateral estoppel as separate principles, the former referring only to claim preclusion and the latter referring to issue preclusion. In this opinion we use the term "res judicata" in this narrow sense.

ment on any ground supported by the record even if not relied upon by the district court, *Nichols v. City of St. Louis,* 837 F.2d 833, 835 n.2 (8th Cir. 1988); *Brown v. St. Louis Police Dept.,* 691 F.2d 393, 396 (8th Cir. 1982), *cert. denied,* 461 U.S. 908 (1983), and we do so in this case. We hold that all of the claims asserted against Peterson and Covell (the two panel members) are based on the same cause of action that was asserted in *Lane I* and are thus barred by res judicata.[4]

Res judicata bars relitigation of a claim if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Murphy v. Jones,* 877 F.2d 682, 684 (8th Cir. 1989). Neither party disputes that the first two requirements are met in this case. The Lanes claim, and the district court apparently believed, that the third requirement is not met because this case involves claims different from those asserted in *Lane I.* We believe otherwise.

This circuit has adopted the position of the Restatement (Second) of Judgments in determining whether two causes of action are the same for res judicata purposes. Generally, under this approach a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim. *See Murphy,* 877 F.2d at 684-85; *Hufsmith v. Weaver,* 817 F.2d 455, 461 (8th Cir. 1987); *Poe,* 695 F.2d at 1105-06. The Restatement (Second) of Judgments provides:

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4. Mr. Sullivan cannot rely on res judicata because he was not a party or privy to a party in *Lane I.* The claims against him are addressed separately in this opinion.

Originally, collateral estoppel was limited by the principle of mutuality, which provided that "neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Id.* at 326-27 (footnote omitted). However, the mutuality requirement under federal law has been abandoned. Now, a party may rely on collateral estoppel even though he or she is not bound by the prior judgment if the party against whom it is used had a full and fair opportunity and incentive to litigate the issue in the prior action. *Id.* at 332. *See also* 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4464 (1981).

The doctrine of res judicata, by contrast, continues to include the requirement that only parties or privies to parties bound by the first judgment may rely on its preclusive effect. This is true not because of the mutuality concept, once required in collateral estoppel, but because of the notion inherent in the doctrine of res judicata that claims against different parties necessarily are different claims. *See* Restatement (Second) of Judgments §49 and comment a (1980) (discussing the principle that a plaintiff injured by two or more persons has a separate claim against each wrongdoer); *Montana v. United States,* 440 U.S. 147, 154 (1979) ("Preclusion of . . . nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action.").

The district court in this case held that the Lanes' §10(b) claims and their claims that the defendants breached their fiduciary duties were barred by collateral estoppel. The district court did not hold that any of the Lanes' claims were barred by the doctrine of res judicata. We believe that the preclusive effect of *Lane I* is broader than recognized by the district court. We may affirm a judg-

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments §24 (1980).[5]

With this approach to the "same claim" concept in mind, we compare the claims asserted in *Lane I* with those in the instant case. In *Lane I* the Lanes claimed that the panelists breached fiduciary duties under Arkansas law by acquiring the Companies' stock and failing to advise them of Tyson's interest in purchasing the Lane Companies. The Lanes requested the court to impose a constructive trust on the proceeds of the sale to Tyson for these reasons and also because the July 22 transactions did not reflect the parties' oral agreement, the stock transfer was not supported by adequate consideration, and to prevent unjust enrichment of the panelists and the Lane Company employees.

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5. This is not to say that differences in proof should never be considered as a relevant factor in determining whether two claims are the same. Significant differences in necessary proof may indicate that the claims simply do not overlap significantly and thus are not based on the same nucleus of facts. What we reject is a hard-and-fast rule regarding different proof that invites parties opposing preclusion to isolate particular bits of differing evidence arising from the same nucleus in an attempt to make the second claim look entirely different.

In the instant case the Lanes claim that the defendants violated a variety of federal laws by their conduct. They claim that by acquiring the stock the defendants breached their fiduciary duties under federal law. The Lanes assert that the defendants violated federal securities laws by failing to disclose that the panelists were the actual beneficiaries under the Declaration of Trust, that Sullivan was acting as counsel to the panel while he was counsel to them, and that the panel had agreed to sell the Lane Companies to Tyson. The Lanes claim that by this same conduct the defendants violated RICO. Additionally, the Lanes claim herein that the defendants violated 18 U.S.C. §152 by requiring them to transfer their stock as a condition of the panelists' agreement to assume control of the Lane Companies prior to the end of the cure period. Finally, the Lanes assert that the defendants violated 11 U.S.C. §1127(b) by failing to notify the bankruptcy court when they modified the reorganization plan by executing the stock transfer agreement and the Declaration of Trust. As a remedy in this case the Lanes ask the court to order the defendants to disgorge any profits they realized from the sale of the Lane Companies to Tyson. They further seek damages for the loss they suffered by the defendants' breaches of their fiduciary duties.

Applying the Restatement (Second)'s definition of "same claim", we think it indisputable that *Lane I* and this case present the same claim for res judicata purposes. The cases involve precisely the same nucleus of operative facts: the Lane Companies' reorganization in bankruptcy, the establishment of the panel, the stock transfer agreement and Declaration of Trust, and the sale of the Lane Companies to Tyson. The gist of all of the claims in this case and those in *Lane I* is that the defendants wrongfully acquired and sold the Lane Companies and should now be made to disgorge the proceeds.

Concededly, some of the claims asserted here would involve some evidence that perhaps was not relevant in *Lane I.* For example, the district court noted that the Lanes' instant claim under 11 U.S.C. §1127(b) would require "proof not only that defendants deceived plaintiffs in various ways, but also that they wrongfully failed to notify the bankruptcy court of such activities—an entirely different factual issue requiring different proof [from that involved in *Lane I*]." *Lane v. Peterson,* No. 88-2145, slip op. at 22-23 (W.D. Ark. Dec. 23, 1980). We recognize this; what we take issue with is the conclusion that where the second action would involve proof of some facts that were not operative in the prior suit res judicata necessarily does not apply. The Restatement (Second)'s "transactional" approach to res judicata contemplates that there may be some variance in the proof required for claims that are nonetheless the "same claim" for res judicata purposes. The operative question in each case is whether the claims arise out of the same nucleus of facts. As stated in the Restatement (Second) of Judgments,

> [t]he present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Restatemnct (Second) of Judgments §24, comment a at 197 (1980).[3]

Similarly, the Lanes' reliance in this suit on different substantive law and new legal theories does not preclude the operation of res judicata. One of the merits of the Restatement (Second)'s approach is that it prevents parties

from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim. *See Mills v. Des Arc Convalescent Home,* 872 F.2d 823, 826-27 (8th Cir. 1989) (prior Title VII claim barred §1981 claim); *Chester v. St. Louis Housing Authority,* 873 F.2d 207, 208-09 (8th Cir. 1989) (procedural due process claim barred later claim for Title VII and equal protection violations); *Hufsmith,* 817 F.2d at 460-61 (prior Sherman Act claim barred tortious interference with contract claim); *Headley v. Bacon,* 828 F.2d 1272, 1275 (8th Cir. 1987) (prior Title VII claim and later claims based on 42 U.S.C. §§1982, 1983, and 1985 were the same for res judicata purposes); *Roach v. Teamsters Local Union No. 688,* 595 F.2d 446, 449-50 (8th Cir. 1979) (claim against union for breach of duty of fair representation barred later action for violation of free speech and assembly rights). *See also* Restatement (Second) of Judgments §24 comments a, b, & c (1981).

In sum, we hold that the claims in this case arise out of the same nucleus of operative facts involved in *Lane I.* Thus, the doctrine of res judicata bars the Lanes' claims against Peterson and Covell, the two defendants herein who were parties in *Lane I.* However, this holding does not dispose of the claims against Sullivan because he was neither a party nor privy to a party in *Lane I.* We thus turn to those claims.

B. Claims against Sullivan

The Lanes' claims against Sullivan do not warrant extended discussion. The Lanes voluntarily dismissed their

§10(b) securities fraud claim against Sullivan after the district court held that those claims were meritless as against Peterson and Covell. The Lanes have apparently abandoned their §17(a) securities fraud claim against Sullivan. In any event, that claim is without merit because, as the district court found, the Eighth Circuit has held that there is no implied private right of action under §17(a) of the Securities Act of 1933. *See Krause v. Perryman,* 827 F.2d 346, 349 (8th Cir. 1987).

Further, it appears from the pleadings and motions that the claims based on 18 U.S.C. §152 are asserted only against Peterson and Covell. That is, in those claims the Lanes complain that only Peterson and Covell acted unlawfully in receiving the stock for acting or forbearing to act in a case under title 11. *See* First Amended Complaint at 12-13, Appendix at 129-30; Plaintiffs' Response to Defendants' Motion for Summary Judgment at 2, Appendix at 197.

The Lanes' fiduciary duty claim against Sullivan will also be dismissed. In that claim the Lanes allege that Sullivan is liable for participating with the panelists in the events culminating in the stock transfer on July 22, 1985. That issue was litigated in *Lane I,* where this court found that the panelists did not breach fiduciary duties by acquiring the stock. *Lane I,* 851 F.2d at 197. Therefore, the Lanes' claim that Sullivan breached fiduciary duties by participating with the panelists is barred by collateral estoppel.

The district court dismissed the Lanes' RICO claim for failure to state a claim upon which relief could be granted, and we affirm that dismissal. To state a valid RICO claim, the Lanes were required to allege that Sullivan engaged in a pattern of racketeering activity

wherein the racketeering activity, or, predicate acts, were related and amounted to, or pose a threat of, continued criminal activity. *See H.J. Inc. v. Northwestern Bell Telephone Co.,* 109 S.Ct. 2893, 2900 (1989); *Atlas Pile Driving Co. v. DiCon Financial Co.,* 886 F.2d 986, 993-94 (8th Cir. 1989). In this regard the Lanes claim that Sullivan engaged in fraud connected to a case under title 11 and in the sale of securities, which are predicate acts under RICO. However, the Lanes do not allege that Sullivan's acts amounted to or pose a threat of continued criminal activity. Further, the Lanes do not sufficiently allege that Sullivan derived income from the alleged pattern of racketeering activity as required by RICO.

Finally, we affirm the district court's dismissal of the Lanes' claims based on 11 U.S.C. '1127(b). The district court reached the merits of this claim and concluded that the stock transfer agreement did not constitute a modification of the plan. We agree with that conclusion, but we believe that the Lanes' §1127(b) claim suffers from a more fundamental problem. Section 1127 is not a statute which creates a right of action or imposes penalties in the event that a reorganization plan is modified without bankruptcy court approval. It provides standing to reorganized debtors or proponents of a plan to modify a plan after confirmation and provides that such modification becomes the plan if the court confirms it. *See Goodman v. Phillip R. Curtis Enterpriss, Inc.,* 809 F.2d 228, 233 (4th Cir. 1987). We do not believe that §1127(b) provides a right of action by a reorganized debtor against a party who allegedly conducted transactions that effected a modification of the plan without court approval.

To some extent, the Lanes' claims against Sullivan, even if valid, would be barred by the collateral estoppel effect of *Lane I.* Although the issue of Sullivan's liability

was not actually litigated in *Lane I,* some of the factual findings in that case regarding the panelists' liability substantially undermine the Lanes' instant claims against Sullivan. We have chosen to dismiss these claims on their merits rather than on collateral estoppel grounds primarily for brevity's sake. We do not suggest that there are not other bases upon which the claims against Sullivan could be dismissed.

III. CONCLUSION

In sum, we affirm the district court's dismissal of the Lanes' claims against Peterson, Covell, and Sullivan. All claims against Peterson and Covell are barred by the doctrine of res judicata because those claims were or should have been asserted in *Lane v. Peterson,* 851 F.2d 193 (8th Cir. 1988). The claims against Sullivan are without merit and are also dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B—MEMORANDUM OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CLIFT C. LANE, INDIVIDUALLY, and as TRUSTEE UNDER THE CLIFT C. LANE REVOCABLE TRUST, and as TRUSTEE UNDER THE DOROTHY P. LANE TRUST, and DOROTHY P. LANE, INDIVIDUALLY, and as TRUSTEE UNDER THE DOROTHY P. LANE REVOCABLE TRUST, and as TRUSTEE UNDER THE CLIFT C. LANE TRUST

PLAINTIFFS

vs. Civil No. 88-2145

JOHN E. PETERSON, JR., and EDWARD H. COVELL, INDIVIDUALLY, and as MEMBERS OF THE SPECIAL PANEL, WILLIAM B. SULLIVAN, and JOHN DOES I THROUGH X

DEFENDANTS

MEMORANDUM OPINION

I. *Facts*

A. Generally

The facts of this case, as alleged by plaintiffs, are as follows: Plaintiffs developed their poultry business (hereinafter the "Lane Companies") over a 35-year period. Aftter a period of financial diffeculties, plaintiffs filed a bankruptcy petition on November 7, 1982. Under a reorganization plan confirmed in 1984 (Amended Com-

plaint ¶ 14) (DB 2),[1] plaintiffs were forced to appoint a Special Panel to aid them in reorganizing their business and to appoint William Sullivan as their counsel in reorganization proceedings. The defendants in this case are Sullivan and two of the three Special Panel members, namely, John Peterson and Edward Covell.[2] Plaintiffs claim that by virtue of their position the Special Panel members are fiduciaries.

Between the filing of the bankruptcy petition and July 22, 1985, plaintiffs and the Special Panel essentially co-managed the Lane Companies. On May 17, 1985, the Bank of America (one of plaintiffs' creditors) notified the Lanes that certain cash transfers within the Lane Companies created a default, which (if not cured by August 1985) would require the Panel to assume the Lanes' management duties. Although the Special Panel could have cured the default, it failed to do so. Defendant Sullivan allegedly suggested that the Special Panel be given management powers before the end of the cure period, and falsely claimed that otherwise a forced liquidation of company assets would occur.

1.
DB = Defendants's Brief in Support of Motion
PB = Plaintiffs' Brief in Support of Cross-Motion
PRB = Plaintiffs' Response Brief
DRB = Defendants' Response Brief
PX = Plaintiffs' Exhibit
DX = Defendants' Exhibit

2. In addition, "John Does I through X" are named as defendants. They are presently unknown to plaintiffs, although it is alleged that they aided the other defendants (Amended Complaint, ¶¶26, 28).

During the summer of 1985, the Special Panel allegedly reached a secret agreement with Tyson (one of plaintiffs' competitors) to buy the Lane Companies from plaintiffs and then sell them to Tyson. The Panel allegedly reached this agreement without any competitive bidding, and rejected better offers from other competitors. The Special Panel failed to disclose its communications with Tyson to plaintiffs.

In July, 1985, plaintiffs agreed to transfer the Lane Companies' management to the Special Panel before the end of the cure period in August. The Special Panel refused to assume control of the Lane Companies unless the Lanes agreed to transfer their stock to the Panel. The stock transfer was not necessary to fulfill the Special Panel's obligation under the reorganization plan, but was allegedly required by the secret agreement with Tyson to exclude plaintiffs from the Lane Companies' operation. Defendant Sullivan encouraged the Lanes to transfer the stock to the Panel, and failed to advise plaintiffs that they had no obligation to do so. Defendant Sullivan allegedly misled the Lanes because he was acting as counsel to the Special Panel, and was acting under a conflict of interest.

On July 22, 1985, the Lanes were induced to transfer their stock to the Special Panel. Plaintiffs executed a Stock Transfer Agreement which stipulated that the stock would be held under a Declatration of Trust. The Delaration of Trust, which was executed only by the Special Panel. Plaintiffs executed a Stock Transfer Agreement which stipulated that the stock would be held under a Declaration of Trust, which was executed only by the Special Panel, stipulated that the stock would be held in trust by the SpecialPanel for the Lane Companies' employees, but gave the Panel unfettered discretion to distribute the trust's assets. Thus, the Special Panel was

(according to plaintiffs) both the trustee and the actual beneficiary of the trust, and is therefore the actual owner of the Lane Companies.

Defendants refused to show plaintiffs the Declaration of Trust or to disclose its terms. Thus, plaintiffs were unaware of the trust's terms at the time of the transfer. After plaintiffs transferred their interests in the Lane Companies, the Special Panel sold the Lane Companies to Tyson pursuant to the alleged secret agreement with Tyson. Defendant Sullivan resigned as counsel for the Lanes in 1987 without informing them (Amended Complaint, ¶ 46). Planitiffs further allege that defendants failed to inform the Bankruptcy Court of the above events (Amended Complaint, ¶ 47), to request that the Bankruptcy Court discharge the Lanes (Amended Complaint, ¶48) or to seek Bankruptcy Court approval in advance for the stock transfer agreement (Amended Complaint, ¶ 50).

Plaintiffs have previously litigated another case against defendants Peterson and Covell. In 1986, plaintiffs filed a suit alleging that defendants Peterson and Covell (as well as Walter Minger, a member of the Special Panel who is not named as a defendant in the instant case) breached their fiduciary duties to plaintiffs by their conduct. Judge Oren Harris of this district denied all relief and his decision was affirmed. *Lane v. Peterson,* No. 86-4069, slip op. (W.D. Ark. July 2, 1987) (hereinafter "Harris opinion"), *aff'd,* 851 F.2d 193 (8th Cir. 1988).

B. *Procedural History*

Plaintiffs originally asserted claims under federal secutities law, the Racketeer Influenced and Corrupt Organizations Act (RICO), Arkansas contract law, and federal bankruptcy law. On August 24, 1988, defendants moved to dismiss the original complaint. The court

granted the motion in part and denied it in part, and further ordered that the complaint be amended to restate plaintiffs' bankruptcy claim with greater specificity. On January 17, 1989, plaintiffs filed an amended complaint. The amended complaint states the followint claims:[3]

1. That defendants violated 18 U.S.C.A. §152 (1989 Supp.), which imposes criminal penalties against any person who knowingly and fraudulently "attempts to obtain any money or property... for acting or forbearing to act in any case under Title 11...." Plaintiffs argue that this statute was violated when defendants requested the stock transfer "as a condition of fulfilling their obligation as members of the Special Panel...." (Amended Complaint, § 43).

2. That defendants violated 18 U.S.C.A. §154 (1989 Supp.) which imposes criminal penalties against any officer of the court for purchasing "any property of the estate of which he is such officer in a case under Title 11...." Plaintiffs allege that the Special Panel violated §154 by acquiring a personal interest in the Lane Companies stock (Amended Complaint, ¶ 43) and that defendant Sullivan did so by collaborating with the other defendants (PB 12-14). Although § 154 is a criminal statute, plaintiffs apparantly argue that defendants' violations render the stock transfer void as a breach of fiduciary duty.

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3. In addition to the claims below, the amended complaint also stated a claim for securities fraud (Amended Complaint, ¶41). The securities fraud claim against defendants Peterson and Covell was dismissed in this court's order of December 23, 1988. In a letter received by this court on April 13, 1989, counsel for plaintiffs dropped the securities fraud claim against defendant Sullivan on the basis that "[s]ince the Court has determined that any claim for violation of the securities laws against Mr. Peterson and Mr. Covell is barred, the claim against Mr. Sullivan which is dependent on the liability of Messrs. Peterson and Covell, is barred for the same reasons." Accordingly, defendants' motion for summary judgment will be granted as to all securities claims.

3. That defendants violated various bankruptcy statutes (Amended Complaint, ¶50) by, *inter alia*,[4] failing to notify the Bankruptcy Court of the events described above (Amended Complaint, ¶45).

Of the statutes cited by plaintiffs,[5] the most relevant one is 11 U.S.C.A. §1127(b) (1989 Supp.), which states that the proponent of a plan or a debtor may modify a reorganization plan after confirmation only if "the court, after notice and a hearing, confirms such plan as modified. . . ." Plaintiffs argue that the stock transfer and declaration of trust "constituted modifications of the Plan which required approval pursuant to 11 U.S.C. §1127 and related provisions." (Plaintiffs' Response to Defendants' Motion for Summary Judgment, ¶7).

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4. Plaintiffs also claim that defendant Sullivan appeared before the bankruptcy court after resigning as their counsel, failed to notify plaintiffs of such appearances, and failed to ask the court to discharge plaintiffs from the bankruptcy proceeding. Plaintiffs further allege that defendant Peterson wrongly failed to notify the bankruptcy court of the other suits involving the parties to this case. Plaintiffs do not show how any of these actions could constitute a modification of the reorganization plan under 11 U.S.C. §1127, or how they violate any other statute.

5. Defendants correctly note that the relevant section of the amended complaint is defective, because it mentions numerous sections of the Bankruptcy Code without stating how any of them were violated. The deficiencies in the amended complaint, however, were cured by plaintiffs' response to defendants' summary judgment motion, which specifies that §1127 was violated and shows how it was violated.

II.

A.

As noted above, plaintiffs allege that "[t]he transfer of the Stock to Peterson and Covell as a condition of fulfilling their obligation as members of the Special Panel is void and unenforceable because the demand violates 18 U.S.C. §152" (Amended Complaint, ¶ 43), which imposes criminal penalties against any person who knowingly and fraudulently "attempts to obtain any money or property . . . for acting or forbearing to act in any case under Title 11. . . ." This section of Title 11 "covers extortion and bribery, or attempts to extort or bribe." *In Re Aiken,* 80 B.R. 971, 973 (Bkrtcy. E.D. Mo. 1988).

Defendants admit that they would succeed plaintiffs as directors of the Lane Companies only on condition "that plaintiffs give up all of their stock . . . ." (Statement of Material Facts, ¶4), but argue that the §152 claim should nevertheless be dismissed because §152 is a criminal statute and therefore creates no private cause of action (DRB 2).[6] Plaintiffs contend that "[t]here are many civil cases decided under 18 U.S.C. §152 where transactions that violate the statute are held to be void by the courts" (PRB 4).

In the instant case, defendants' alleged violation of §152 may render the stock transfer agreement void as against public policy. *See e.g. Crandall v. Durham,* 152

6. Defendants also note in passing that plaintiffs have sued defendant Sullivan for legal malpractice, and suggest that the instant action should therefore be dismissed because plaintiffs "should not be permitted to split their cause of action." (DB 21-22). As defendants make no further argument on this issue and cite no authority whatsoever, the court will not address this argument.

S.W.2d 1044, 1045, 348 Mo. 240, __ (1941) (where bankrupt agreed to pay note in exchange for creditor's agreement not to oppose discharge in bankruptcy, agreement to pay void and unenforceable as against public policy); *J.M. Deutsch, Inc. v. Robert Paper Co.*, 215 N.Y.S.2d 939, 939-40 (1961) (where debtor allegedly coerced into conferring secret preference in violation of §152, agreement void as against public policy). Accordingly, the §152 claim will not be dismissed merely because §152 is a criminal statute.

Defendants further argue that because plaintiffs' stock was allegedly not covered by the reorganization plan, the stock transfer therefore did not occur in a "case under Title 11." (DB 9). Because §152 governs attempts to obtain "any money or property," defendants may be liable thereunder even if the Lanes' stock was exempt from the reorganization plan. Nevertheless, the court finds that the stock transfer agreement did not occur in a "case under Title 11." The term "case under Title 11" has been defined only in cases under 28 U.S.C.A. §1334(a) (1989 Supp.), which gives district courts jurisdiction over cases under Title 11. Although the available definitions are quite vague, they appear to suggest that the "case" must be closely related to the original bankruptcy petition rather than later events such as reorganization. *See In Re American Energy, Inc.*, 50 B.R. 175, 178 (Bkrtcy. N.D. 1985) (a case under Title 11 is "the original bankruptcy petition itself from which all other bankruptcy proceedings spring"); *In Re Hudson Oil Co., Inc.*, 68 B.R. 735, 737 (D. Kan. 1986) (case under Title 11 is "the case begun by the filing of the bankruptcy and 'the case upon which all of the proceedings which follow the filing of a petition are predicated' "), *quoting* 1 *Collier on Bankruptcy* ¶ 3.01 at 3-20 (15th ed. 1986). For instance, where a defendant who was undergoing reorganization terminated

plaintiff, plaintiff's wrongful discharge suit "obviously did not fall within this definition. . . ." *In Re Hudson Oil Co., Inc.*, 68 B.R. at 737. Cases "under Title 11" are distinguished by statute from those "arising under" Title 11 or "related to cases under Title 11." 28 U.S.C. §1334(b) (1989 Supp.). The latter categories include all matters related to bankruptcy, *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987), while the first category "refers merely to the bankruptcy petition itself. . . ." *Id.* at 92.

In this case, the only relationship between the stock transfer agreement and the bankruptcy petition is that the Special Panelists' authority derived from the reorganization plan, which derived its existence from the filing of a bankruptcy petition two years earlier. Accordingly, the court finds that the stock transfer agreement was not part of the bankruptcy petition case itself, and will grant defendants' motion for summary judgment as to plaintiffs' §152 claim.[9]

B.

18 U.S.C.A. §154 (1989 Supp.) provides that an officer of the court in a bankruptcy proceeding may not knowingly purchase "any property of the estate of which he is such officer in a case under title 11. . . ." Plaintiffs allege that defendants violated this statute by acquiring their stock, and that "[t]he dispositive issue in this case is self-dealing by a court-appointed fiduciary." (PRB 1).

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9. The court therefore need not address defendants' contentions that (1) the §152 claim is barred by Judge Harris' finding that defendants acted without fraudulent motive, Harris Opinion at 21, and (2) even if other defendants are liable under §152, defendant Sullivan is not because he received no property.

In a civil action, plaintiffs may not sue directly under §154, but may allege that violations of §154 constitute a breach of defendants' common-law fiduciary duties. *See Donovan & Schuenke v. Sampsell,* 226 F.2d 804, 808 (9th Cir.), *cert. denied sub. nom. Freedman v. Donovan & Schuenke,* 350 U.S. 895 (1955) (where plaintiff attempted to apply §154 in civil action, court refused to apply §154 but held that transaction may be void as a breach of fiduciary duty).

Because plaintiffs' §154 claim is essentially a claim for common-law breach of fiduciary duty, the court will not dismiss the claim based on the "case under Title 11" clause in §154. Plaintiffs' claim for breach of fiduciary duty is independent of their statutory claim because defendants can breach such duties without violating §154. By contrast, plaintiffs' claim that defendants' threats violated public policy is wholly derivative of plaintiffs' allegations that such threats violated §152, and were therefore appropriately dismissed as part of the §152 claim. The court accordingly holds that although the stock transfer did not occur in a case "under Title 11," plaintiffs' fiduciary duty claim will not be dismissed on this basis.

A better argument for summary judgment is that the issue of whether defendants breached their fiduciary duty was litigated in the first *Lane* case and therefore may not be relitigated. In this action, plaintiffs allege that because the Declaration of Trust granted the Special Panel absolute discretion in distributing the trust assets, the Panelists are both trustees and beneficiaries of the trust. Thus, plaintiffs reason, the Panelists engaged in self-dealing and violated their fiduciary duty to the bankruptcy court.

This very question was addressed in earlier litigation. In the first *Lane* case, plaintiffs argued that the Special Panelists (including defendants Peterson and Covell) "breached their fiduciary duty by acquiring the stock . . . because a fiduciary is prohibited from acquiring the property of his principal." *Lane,* 851 F.2d at 196. This argument rested on the assumption that defendants "reserved absolute discretion regarding the distribution of the trust corpus and the transfer was therefore in substance to them." *Id.* at 197. The Eighth Circuit held that "the Panelists did not breach any fiduciary duty in acquiring the stock," *id.,* because the Panelists "do not intend to convert the stock for their own exclusive benefit. . . ." *Id.*

It seems clear that the first *Lane* suit decided the question of whether defendants acquired plaintiffs' stock for their own personal benefit and thereby breached their fiduciary duty. Accordingly, plaintiffs' claim for breach of fiduciary duty is barred by the doctrine of collateral estoppel, which prohibits the relitigation of any issues which were actually litigated in earlier proceedings.

Plaintiffs' fiduciary duty claim against defendant Sullivan is derivative of the claim against defendants Peterson and Covell. Plaintiffs do not claim that defendant Sullivan is independently liable, but merely that he "participated with Peterson in all transactions culminating in the transfer of the Stock on July 22, 1985." (PB 12). As plaintiffs' claims under §154 and for breach of fiduciary duty will be dismissed as to defendants Peterson and Covell, they will also be dismissed as to defendant Sullivan.

C.

Plaintiffs also allege that defendants violated various other bankruptcy statutes, most notably 11 U.S.C. §1127(b), by failing to notify the bankruptcy court of the events described above. Section 1127(b) provides that a plan may be modified after confirmation only if the court, "after notice and a hearing, confirms such plan as modified. . . ." Plaintiffs apparently allege that the stock transfer and Declaration of Trust constituted modifications of the plan under §1127(b). Defendant Peterson's uncontradicted testimony states that the bankruptcy judge was informed after the fact of the stock transfer (DX J), but that there was no formal court hearing regarding the transfer (DX K). Thus, the question presented is whether the stock transfer or the Declaration of Trust constitutes a modification of the reorganization plan. As these agreements were not designated as modifications, §1127 applies only if they were prohibited by the original plan.

Although plaintiffs state that the stock transfer and related transactions are modifications of the plan, they fail to state how the plan has been modified or what portion of the plan would have barred the sale. Thus, plaintiffs' motion for summary judgment will be denied.

On the other hand, defendants have also failed to show that they are entitled to summary judgment on this issue. As defendants note (DB 9), plaintiffs' common stock is part of their "personal assets" under the plan, and Section 5.10 provides that "[t]he interests of the Class H holders of capital stock of the corporate Debtors shall not be affected and are unimpared by the provisions of the Plan." It is not altogether clear how these provisions are relevant to the question of whether the plan as originally drafted prohibited the agreements at issue. Without fur-

ther fact-finding as to the meaning of the original plan, the court cannot decide whether the stock transfer is in fact a modification thereof. Accordingly, both cross-motions will be denied as to plaintiffs' claim under 11 U.S.C. §1127.

III. *Conclusion*

In sum, the court will:

1. Grant defendants' motion for summary judgment as to the securities fraud claim;

2. Grant defendants' motion for summary judgment as to all claims arising out of 18 U.S.C. §152 and §154, and as to plaintiffs' related claim for breach of fiduciary duty;

3. Deny defendants' motion for summary judgment as to plaintiffs' claim under 11 U.S.C. §1127(b); and

4. Deny plaintiffs' motion for summary judgment.

April 15, 1989

s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE